

**STATE MINING AND GEOLOGY BOARD****DEPARTMENT OF CONSERVATION**

801 K Street • Suite 2015 • Sacramento, California 95814

PHONE: 916 / 322-1082 • FAX: 916 / 445-0738 • TDD: 916 / 324-2555 • INTERNET: [conservation.ca.gov/smgb](http://conservation.ca.gov/smgb)ALLEN M. JONES, CHAIR  
CHERYL BLY-CHESTER, VICE CHAIRJULIAN C. ISHAM  
SEENA HOOSE  
KATHY LUNDERIN GARNER  
ROBERT TEPEL**TITLE 14, NATURAL RESOURCES****NOTICE OF PROPOSED RULEMAKING CHANGE****BOARD VESTED RIGHTS DETERMINATION**

[Pursuant to Government Code Sections 11346.8(c) and 11347.3(a)(9);  
California Code of Regulations, Title 1, Section 44]

**NOTICE IS HEREBY GIVEN** that the State Mining and Geology Board (Board) proposes to change a portion of the proposed regulation which establishes a procedure whereby the Board must provide at least 90 days advance notice of a vested rights public hearing.

**REGULATORY ACTION**

At its February 14, 2008, regular business meeting, the State Mining and Geology Board (Board) made a change to the text of Section 3506.10, subdivision (b), paragraph (4) of its proposed regulations which presents the administrative procedure for conducting a vested rights determination when serving as a lead agency under the Surface Mining and Reclamation Act of 1975 (SMARA), and subsequently adopted such change. The change to this portion of the proposed regulation establishes a procedure whereby the Board must provide at least 90 days advance notice of a vested rights public hearing. Specifically, the change reflects a modification in the timing for any responsive materials to be delivered to the Board prior to the hearing.

**PUBLIC HEARINGS AND WRITTEN COMMENTS**

The Board has adopted the proposed change at its February 14, 2008, regular business meeting; however, the Board must also provide an opportunity for public comment for any interested person, or his/her authorized representative.

Any interested person may submit written comments relevant to the proposed regulatory action to the Board. The 15-day Written Comment Period closes at 5:00 P.M., June 2, 2008. The Board will consider only relevant comments received at the Board office by that time. Late submittals will not be considered.

## **AUTHORITY AND REFERENCE**

The Board proposes to adopt a regulation that adopts §3506 to Article 1 of the California Code of Regulations, Title 14, Division 2, Chapter 8, Subchapter 1, pursuant to its authority granted in PRC §2755, and PRC §2770(a) and PRC §2774.4(a), and *Calvert v. County of Yuba* (2007) 145 Cal.App.3<sup>rd</sup> 613. The Board is clarifying and makes specific the administrative process under which a vested rights determination can be made when the Board is acting as a lead agency under SMARA (PRC §2710 et seq.).

## **PROPOSED REGULATORY CHANGE**

Section 3506.10 in its entirety, with the change underlined, is provided below:

### **Section 3506.10 Vested Rights Hearing Procedure – Notice/Submission of Written Materials.**

- (a) At least 90 calendar days prior to a vested rights public hearing, the Board shall give further public notice as follows:
- (1) By mailing the notice to the Claimant and all parties receiving notice pursuant to Section 3506.6;
  - (2) By mailing the notice to any person who requests notice of the hearing;
  - (3) By mailing the notice to the Board's regular mailing list; and
  - (4) By posting of the notice in a place where notices are customarily posted in the city, or county, or regional jurisdiction within which the property is located or the surface mining operations are to take place (or both, if affected operations and affected property are in different jurisdictions.)

- (b) The notice of hearing shall include the following:
- (1) The name of the party claiming vested rights;
  - (2) Identification of the surface mining operation, a brief description of the location of the operation and area of asserted vested rights by reference to any commonly known landmarks in the area, and a simple location map indicating the general location of the operation;
  - (3) A statement inviting the party claiming vested rights, the original lead agency, and the public to make statements at the hearing regarding the vested rights asserted;
  - (4) A request that any additional written materials be delivered to the Board no less than 60 calendar days before the hearing and in no case will any responsive materials be submitted less than 45 calendar days prior to the hearing.
  - (5) The time, date, and location of the public hearing.

## **INFORMATIVE DIGEST**

### **Statutory and Regulatory Background**

The Surface Mining and Reclamation Act of 1975 was enacted to ensure that significant adverse impacts of surface mining to the environment are prevented or mitigated, and public health and safety are protected. Under SMARA, surface mining operators are required to submit to their respective lead agencies (cities and counties) for approval, a plan for reclaiming mined lands as well as proof of financial assurances to ensure those mined lands are reclaimed in accordance with the approved reclamation plan. Lead agencies are responsible for ensuring their surface mining operators are in compliance with SMARA's permit and reclamation requirements. The Department of Conservation (Department) and the Board provide SMARA lead agency assistance and oversight.

SMARA is designed to be implemented primarily by local agencies acting as lead agency. A lead agency is defined in PRC §2200.5 (Chapter 2) and PRC §2728 (Chapter 9) as a city, county, the San Francisco Bay Conservation and Development Commission, or the Board, as appropriate.

SMARA provides, under specified circumstances, for the Board to assume the role of lead agency for the administration of SMARA when a local lead agency is not able to perform that role (PRC §2774.4, §2774.5). Since 1998, the Board has assumed the role of SMARA lead agency 49 times. Currently, the Board is the SMARA lead agency for two counties, El Dorado County and Yuba County, and 6 cities, and 11 dredging operations in the San Francisco Bay area, encompassing 47 mines.

PRC §2207(e) authorizes lead agencies, including the Board when acting as a lead agency, to impose a fee upon each mining operation to cover its reasonable costs in implementing Chapter 2 (annual reporting requirements) and Chapter 9 (SMARA) of the Public Resources Code.

### **Determination of Vested Rights**

PRC §2770(a) provides that no person shall conduct surface mining operations unless a permit has been obtained, and a reclamation plan and financial assurances have been submitted and approved by the lead agency. However, a permit is not required if the mining operator has a vested right to mine. A 'vested right' is the right to conduct a legal, non-conforming use of real property, if that right existed lawfully before a zoning or other land use restriction became effective and the use is not in conformity with that restriction when it continues thereafter. A vested right to conduct surface mining operations is established pursuant to PRC §Section 2776 if, prior to January 1, 1976, the mining operator has, in good faith and in reliance upon a permit or other authorization, where the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefore, excluding expenses incurred in obtaining the enactment of an ordinance or the issuance of a permit. Section 2776 provides that a mining operator who has a vested right to conduct surface mining operations prior to January 1, 1976, shall not be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation.

California Code of Regulations (CCR) Title 14, Article 1, Section 3505, provides special provisions where a surface mine operator with vested rights continues surface mining in the same area subsequent to January 1, 1976. In such circumstances, the operator shall obtain approval of a reclamation plan covering the mined lands disturbed by such subsequent surface mining. In addition, in those cases where an overlap exists, horizontally and/or vertically, between pre-and post-SMARA mining, the reclamation

plan shall call for reclamation proportional to that disturbance caused by the mining after the effective date of the Act.

In the matter of William Calvert et al. v. County of Yuba et al., 145 Cal.App.3<sup>rd</sup> 613, Yuba County, acting as lead agency under SMARA, determined, without public notice and hearing, that Western Aggregates, a mining operation in Yuba County, had a vested right to mine. The 3<sup>rd</sup> District Court of Appeal found that Yuba County's failure to provide notice and hearing violated the procedural due process rights of the public. The court in its decision stated that SMARA required Western Aggregates either to prove its claim of vested rights in a public adjudicatory hearing or obtain a permit to conduct surface mining operations based on a public adjudicatory hearing. In addition, the court determined that the Board, which had assumed the role of lead agency from Yuba County by this time, was responsible for making the vested rights determination, if petitioned by the operator.

In correspondence dated February 8, 2007, Western Aggregates submitted to the Board a Notice of Intent to seek confirmation of Western Aggregate's vested rights. In addition, requests for vested rights determinations were submitted to Board for two surface mining operations located in El Dorado County. With no administrative procedure or a funding mechanism pursuant to which the Board could conduct such determination, the adoption of new regulation for such purpose is necessary.

### **Summary of Proposed Regulation**

Therefore, the Board has developed regulations setting forth the administrative procedure for determining vested rights, which procedures include provisions for filing by a surface mining operator (or claimant) of a Request for Determination, establishing a review and determination fees mechanism, and determining jurisdiction, notice of pending determination, public hearing, selection of hearing officer if appropriate, and hearing schedule. The effect of the determination is also provided.

For simplicity, and to address varying level of effort required by the Board to consider and subsequently determine whether a vested right exists for relatively small and large operations, a two phase process is recommended. When a Request for Determination is received by the Board, the claimant must submit a minimum processing fee of \$5,000 for initial review and notification. If the Request is denied, any funds not used will be refunded to the claimant. If the Board accepts the Request, then a determination fee for conducting the vested rights determination will be established. The claimant will be provided with an estimate of the cost of conducting a vested rights determination. Any funds in excess of the amount actually needed for conducting the determination will be refunded to the claimant. The fees shall be paid to the Board prior to release of any vested rights determination.

## **POLICY STATEMENT OVERVIEW**

The proposed language in the regulation clarifies and makes specific the procedure to conduct a vested rights determination at the request of a surface mine operator for when the Board is the lead agency under SMARA for that surface mine operation, and the reasonable cost to be incurred by the Board, when considering and determining whether a vested right exist for a surface mine operation under the Surface Mining and Reclamation Act (SMARA, Public Resources Code § 2710 et seq.).

## **CEQA COMPLIANCE**

The Board staff have determined that this rule making project is either not a project under Title 14, CCR § 15378 of the CEQA Guidelines, or is Categorically Exempt under Title 14, CCR § 15308 of the CEQA Guidelines.

## **DISCLOSURES REGARDING THE PROPOSED ACTION**

The Board staff has made the following preliminary determinations:

**Mandate on local agencies and school districts:** The Board staff determined that adoption of this regulation does not impose any new mandates on local agencies or on local school districts.

**Costs or savings to any State agency:** The Board staff determined that this proposed regulation imposes no savings or additional expenses to state agencies.

**Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630:** The Board staff determined this proposed regulation does not impose any additional cost obligations on local agencies or on local school districts.

**Other non-discretionary costs or savings imposed upon local agencies:** The Board staff determined that no other non-discretionary costs or savings to local agencies are imposed by the proposed regulations.

**Cost or savings in Federal funding to the State:** The Board staff determined that there are no costs or savings in Federal funding to the State.

**Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states:** The Board staff determined that no statewide adverse impacts

to California businesses result from the adoption of this proposed regulatory language.

**Potential cost impact on private persons or directly affected businesses:**

The Board staff has determined that the proposed regulatory language will not have a potential cost impact on private persons but will have an impact on directly affected businesses should a surface mine operator request a vested right determination.

**Creation or elimination of jobs in California:** The Board staff has determined that the adoption of these regulations will not:

- Create nor eliminate jobs within California;
- Create new nor eliminate existing businesses within California;
- Expand businesses currently doing business in California.

**Significant effect on housing costs:** The Board staff has determined that the adoption of these regulations will have no significant effect on housing costs.

**Effects on small businesses:** The Board staff has determined that the imposition of the proposed fee for consideration and conduct of a vested rights determination on a local mining operation (which may meet the criteria for a “small business”) may have a cost impact to that operation, but is not anticipated to have a cost impact on small businesses in general.

## **CONSIDERATION OF ALTERNATIVES**

The Board must determine that no reasonable alternative that it considers or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action. Board staff has not identified any adverse impacts resulting from the proposed regulation.

No alternatives have been considered by the Board at this time that would be more effective in carrying out the purpose for which the regulatory action is proposed, nor have any other alternatives been proposed that would be as effective and less burdensome to affected private persons, lead agencies, or small businesses.

## **AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF REGULATIONS**

An interested person may request a copy of the proposed regulation and the Initial Statement of Reasons, or direct questions about the proposed regulation and Initial Statement of Reasons and inspect all supplemental information, upon which the regulation is based, contained in the rulemaking file. The rulemaking file is available for inspection at the Board Office at 801 K Street, Suite 2015, Sacramento, California, between 9:00 A.M. and 4:00 P.M., Monday through Friday except during state holidays. Copies of the proposed regulation and the Initial Statement of Reasons may be requested by writing to the above address, or viewed on the Board's Internet Web Site at: <http://www.conservation.ca.gov/smgb>

## **AVAILABILITY OF CHANGED OR MODIFIED TEXT**

Following the public comment period, the Board may adopt, as final, the proposed regulation substantially as described in this Notice and Informative Digest. Copies of the regulation, as finally adopted, will be sent to all persons on the Board's public comment mailing list for this issue and others requesting copies. If, as a result of public comment, substantive changes to the regulation are deemed appropriate, copies of the proposed changes will be sent to all persons who testified at the public hearing or submitted written comments during the comment period or at the public hearing, and to those who have requested copies of information regarding the regulation. The modified text will be available to the public for at least 15 days before the Board adopts the regulation as revised. The Board will accept written comments for a period of at least 15 days after the date upon which changes were made available. If adopted, the regulation will appear in CCR, Title 14, Division 2, Chapter 8, Subchapter 1, Article 1, §3506. A copy of the Final Statement of Reasons may be obtained by contacting the Board office as described under the section Contact Person.

## **CONFLICT WITH FEDERAL REGULATIONS**

This regulation does not duplicate or conflict with existing Federal statutes or regulations. Also, by Memorandum of Understanding with the Federal Bureau of Land Management, the U. S. Forest Service, the Department of Conservation, and the Board, SMARA and federal law are coordinated to eliminate duplication.

## **CONTACT PERSON**

Inquiries concerning the substance of the adopted regulation should be directed to:

Mr. Stephen M. Testa, Executive Officer  
State Mining and Geology Board  
801 K Street, Suite 2015  
Sacramento, California 95814  
(916) 322-1082

Backup contact person:

Ms. Nicole Bristow  
State Mining and Geology Board  
801 K Street, Suite 2015  
Sacramento, California 95814  
(916) 322-1082